

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

STATE OF VERMONT,

Plaintiff,

v.

MPHJ TECHNOLOGY INVESTMENTS,
LLC,

Defendant.

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DOCKET NO. 2:13-CV-00170

**MPHJ TECHNOLOGY INVESTMENTS, LLC'S COMBINED MOTION AND
MEMORANDUM FOR LEAVE TO SUBMIT ITS SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS UNDER RULE 12(b)(2)**

Defendant MPHJ Technology Investments, LLC (“MPHJ”) respectfully submits this Motion seeking leave to submit a supplemental memorandum in support of its Motion to Dismiss for Lack of Personal Jurisdiction Under FED. R. CIV. P. 12(b)(2).¹ If the Court grants leave to file the Supplemental Memorandum (which is attached hereto as Exhibit A), MPHJ does not oppose the Court permitting the State to provide any Response it may wish to file, and for MPHJ to have any Reply it may wish to file, consistent with this Court’s regular briefing schedule.

At the hearing held by this Court in February regarding MPHJ’s Motion to Dismiss, it became clear that there are two key issues being considered by the Court in deciding whether to grant MPHJ’s Motion. The first of these is the legal question of whether the universally applied law that the sending of patent demand (and patent inquiry) letters into a state is not sufficient to make a patent owner subject to personal jurisdiction of that state, can be negated by mere allegations in a complaint of violations of state law in connection with sending those letters. MPHJ believes it will be helpful to the Court to receive supplemental briefing on this specific point, which is provided in the first section of the proposed Supplemental Memorandum.

Second, it appeared from the hearing that the Court was considering taking into account the State’s unproven allegations of misconduct by MPHJ in deciding the personal jurisdiction question. While MPHJ believes this would be legal error as noted above, it also believes that if the Court is going to decide personal jurisdiction on the basis of these allegations of misconduct, that it should then take into account the facts and law that demonstrate no misconduct occurred.² Thus, the second section of the attached Supplemental Memorandum presents affirmative evidence establishing that none of the State’s allegations have merit. Of course, as an

¹ As required by Local Rule 7(a)(7), counsel for MPHJ sought consent for this motion from counsel for the State. The State does not consent.

² Indeed, the Court itself noted the inherent problem of its deciding the personal jurisdiction issue on the basis of mere allegations in the State’s Complaint. *See* Dkt. 50 at 86:3-16.

independent issue, in this case it is quite clear that Vermont state law does not apply in these circumstances by its terms, and that even if it did, that under federal law and the U.S.

Constitution, Vermont state law cannot be asserted against MPHJ's conduct under the First Amendment. Thus, reliance upon purported violations of state law to find personal jurisdiction over MPHJ would be error for these reasons as well.

BACKGROUND

As this Court is aware, it has pending before it the briefing of all parties on MPHJ's Motion to Dismiss for Lack of Personal Jurisdiction Under FED. R. CIV. P. 12(b)(2). Dkt. 16. In its briefings on that Motion, MPHJ set forth the well-settled law that the principles of fair play and substantial justice, as set forth by the Supreme Court, do not permit a patentee to be subject to personal jurisdiction in a foreign forum, merely for sending patent infringement cease and desist letters there, much less the patent infringement inquiry letters sent by MPHJ. *See* Dkt. 16 at 10-11. MPHJ explained that the policy behind this conclusion is that it would be unfair to subject a patentee to personal jurisdiction in a forum for protecting its intellectual property rights against infringers who happen to reside there. *See id.* at 10. The State opposed MPHJ's Motion – arguing that because MPHJ allegedly violated Vermont law by sending the letters, including statements made within the letters, MPHJ could be subject to personal jurisdiction here. *See* Dkt. 27. MPHJ replied, asserting that the State's allegations or claims did not dictate the personal jurisdiction question, rather, it was MPHJ's contacts with Vermont that determined whether it would comport with Due Process to subject MPHJ to personal jurisdiction here, and the longstanding law has held that it would not. *See* Dkt. 33.

On February 25, 2014, this Court conducted a hearing on the State's remand motion, and MPHJ's Motion to Dismiss. In that hearing, the Court expressed concern that, in order to decide the personal jurisdiction question, it would have to determine the merits of the State's allegations

regarding MPHJ's conduct, and such a "factual determination" would "ultimately [have] to be resolved at trial, and that is backwards." *See* Dkt. 50 at 86:7-16. The Court even expressed concern that there are "totally different standards of personal jurisdiction depending upon the nature of the claim," and because the State has not sought a declaration of invalidity or non-infringement, the personal jurisdiction analysis changes. Dkt. 50 at 89:20-25; 90:1-14.

MPHJ seeks leave to file a supplemental memorandum in support of its Motion to Dismiss to directly address the Court's concerns, and point out that the nature of the State's claims do not alter the jurisdictional analysis, and, even if they did, MPHJ's patent enforcement efforts were entirely lawful, and do not subject MPHJ to personal jurisdiction here.

ARGUMENT

I. Under The Local Rules, This Court Has Discretion To Permit Supplemental Briefing, And Should Do So In This Instance

While Local Rule 7.1 does not address a surreply or supplemental briefing, it is not improper for MPHJ to seek leave to file supplemental briefing here. By this Motion, MPHJ seeks the Court's leave to address specific concerns brought up by the Court in the February hearing, which is supported as being the proper procedure to follow with respect to the filing of a surreply. *See Carthaginian Financial Corp. v. Skinner*, 2005 WL 1388689, at *2 (D. VT. June 3, 2005). This Court, on multiple occasions, has granted leave to submit supplemental briefing in the context of a surreply. While the supplemental memorandum MPHJ seeks leave to file is not a surreply, but instead briefing on points raised by the hearing, the principle still holds that this Court has discretion to accept the supplemental memorandum. *See, e.g., Neronsky v. Jeld-Wen, Inc.*, 2009 U.S. Dist. LEXIS 35947 (D. Vt. Apr. 28, 2009) (Sessions, J.); *Bain v. Cotton*, 2009 U.S. Dist. LEXIS 51759 (D. Vt. June 12, 2009) (Sessions, J.); *Vermont Telephone Co., Inc. v. Comcast Phone of Vermont, LLC*, No. 09-198, Dkt. 56 (D. Vt. July 16, 2010) (Sessions, J.).

Accordingly, for the reasons set forth herein, MPHJ respectfully requests that this Court exercise its discretion and grant MPHJ's Motion for Leave to submit supplemental briefing in support of its Motion to Dismiss, so that MPHJ may respond to the concerns expressed by the Court in the February hearing.

II. This Court Should Permit MPHJ To Submit Supplemental Briefing On The Specific Question Of Whether Mere Allegations Of Misconduct In The Complaint Can Create Personal Jurisdiction Over A Patent Owner Who Otherwise Would Not Be Subject To Personal Jurisdiction For Sending Patent Communications

As explained *supra*, in the February hearing, the Court expressed concern whether it must decide the merits of the State's allegations in order to determine whether there is personal jurisdiction over MPHJ, a patent owner who sent patent related communications into Vermont. *See* Dkt. 50 at 86:7-16. By its supplemental briefing, MPHJ merely desires to address that concern and provide the Court with the well-settled law that explains that that is not the proper procedure to be followed in determining personal jurisdiction. Accordingly, to clear up any misconceptions regarding the law behind personal jurisdiction, MPHJ respectfully requests leave to submit supplemental briefing on this specific issue.

III. If The Court Is Going To Decide The Personal Jurisdiction Issue On The Basis Of Whether MPHJ Engaged In Any Misconduct, Then In Fairness, It Should Accept Supplemental Briefing Providing The Evidence Demonstrating There Had Been No Misconduct, Rather Than Rely Upon The State's Unfounded Allegations

If, after MPHJ presents the law explaining that personal jurisdiction is not decided based off the State's allegations in its Complaint, and the Court finds, instead, that the allegations in the Complaint, if true, would submit MPHJ to personal jurisdiction here, MPHJ respectfully requests that the Court grant MPHJ leave to present evidence that the State's allegations are untrue and unfounded, and, as a result, do not subject MPHJ to personal jurisdiction here.

CONCLUSION

For the foregoing reasons, MPHJ respectfully requests that this Court grant it leave to submit a Supplemental Memorandum in Support of MPHJ's Motion to Dismiss Under FED. R. Civ. P. 12(b)(2).

Respectfully submitted,

Date: April 4, 2014

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